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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 Dennis Andrew Ball, personally and as)  
10 benefactor of the Eleanor R. Ball IrreLvg)  
Trust 5/10/01,

11 Plaintiff,

12 vs.

13 City of Peoria, Arizona, an Arizona)  
14 municipal corporation, and Peoria Police)  
Department

15 Defendants.  
16

No. CV-09-635-PHX-LOA

**ORDER**

17 On March 30, 2009, Plaintiff, proceeding *pro se*, filed a Complaint against the  
18 City of Peoria, Arizona, and its Police Department. (docket # 1) Plaintiff, apparently a citizen  
19 of Illinois, invokes this Court's diversity jurisdiction under 28 U.S.C. § 1332, alleging that the  
20 amount in controversy exceeds \$75,000, and the adverse parties are diverse of citizenship. On  
21 April 30, 2009, the Court dismissed Plaintiff's claims against the City of Peoria Police  
22 Department. (docket # 12) The City of Peoria, the only remaining defendant, moves to dismiss  
23 the Complaint pursuant to Fed.R.Civ.P. 12(b)(6). (docket # 18) Plaintiff filed a response,  
24 docket # 25, to which Defendant replied, docket # 26. Accordingly, this matter is ready for  
25 ruling.<sup>1</sup> Because the parties' briefings are adequate for resolution on the pleadings, the Court  
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28 <sup>1</sup> All parties have consented to magistrate-judge jurisdiction pursuant to 28 U.S.C. §  
636(c). (docket # 23)

denies Defendant's request for oral argument. *Mahon v. Credit Bur. of Placer County, Inc.*, 171 F.3d 1197, 1200 (9th Cir. 1999). (docket # 18) For the reasons set forth below, the Court will grant Defendant's Motion to Dismiss.

## **I. Background**

In his Complaint, Plaintiff alleges an intentional tort claim against the City of Peoria, stemming from a trust that was formed on May 10, 2001 of which his mother, Eleanor Ball, was trustee. (docket # 1 at 2) In early 2004, Eleanor Ball became incapacitated and Morgan Stanley assumed the position of trustee. (docket # 1 at 2) On March 17, 2004, "Jonathan P. Schubert was appointed by the Court as a representative of Eleanor R. Ball." (*Id.* at 3) The "court" also appointed Southwest Fiduciary as "a guardian/conservator for the benefit of Eleanor Ball." (*Id.*) Schubert, who is now deceased, and Southwest Fiduciary "participated at trial on October 7, 2005." (*Id.*)

On September 21, 2005, Plaintiff "petitioned the court" to remove Morgan Stanley as trustee. The petition was granted, and Plaintiff was appointed trustee. Plaintiff alleges that he is also the beneficiary of the trust and that "his interest in the Trust is 100% of the Trust upon the death of Eleanor R. Ball." (*Id.*) Eleanor Ball died on April 28, 2006. (*Id.*)

Plaintiff claims that Southwest Fiduciary drained the assets of Eleanor Ball's trust "with the explicit agreement of John Schubert." (*Id.* at 3-4) Plaintiff further alleges that Schubert breached his fiduciary duty to Plaintiff and Eleanor Ball by "placing his own interests above those of his client and the Plaintiff . . . ." (*Id.* at 4) Plaintiff claims that Schubert's conduct caused financial damage to Plaintiff by wasting the assets of the trust, which were once valued in excess of \$800,000.00. (*Id.*) Plaintiff "is still in the process of recovery and petitions this Defendant to compensate [Eleanor Ball's] estate for that which they lied and contributed to at trial on October 7, 2005." (*Id.*) Plaintiff claims that "Schubert conspired with others to create unnecessary attorney fees and drain" Eleanor Ball's trust. (*Id.* at 5)

Plaintiff's only allegations even marginally related to the City of Peoria are that:

Three police officers of the Peoria Police Department lied at trial regarding

1 their role in the well checks of the decedent, Eleanor R. Ball, prior to  
2 trial on October 7, 2005. The damage sustained by this unlawful conduct  
3 was to cause irreparable loss to the plaintiff causing their actions to  
4 separate him from his parent the last eight months of her life at the Encore  
Senior Village, Peoria, Arizona. Such unlawful conduct cannot be allowed  
to be sustained in a Civilized Society!"

(*Id.* at 4, ¶ 18)

5 Defendant seeks to dismiss the Complaint because Plaintiff failed to comply  
6 with Arizona's notice of claim statute, A.R.S. § 12-821.01. Defendant further argues that  
7 Plaintiff's allegations under Title 42 U.S.C. § 1983 fail to state claim. Because the Complaint  
8 does not make any allegations under § 1983, the Court will not consider Defendant's arguments  
9 pertaining to § 1983. (docket # 1)

## 10 **II. Governing Law**

11 "[F]ederal courts sitting in diversity jurisdiction apply state substantive law  
12 and federal procedural law." *Ball v. City of Peoria*, 2009 WL 959550, \* 1 (D.Ariz. 2009)  
13 (quoting *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003); *Erie R.R. Co. v.*  
14 *Tompkins*, 304 U.S. 64 (1938). Arizona's substantive tort law applies to this federal tort action.  
15 *Id.* (citing *Vestar Dev. II, LLC v. General Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir. 2001);  
16 *Beesley v. Union Pacific R. Co.*, 430 F.Supp.2d 968, 970 (D.Ariz. 2006).

## 17 **III. Legal Standard**

18 In a motion to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6),  
19 the district court considers the legal sufficiency of Plaintiff's claims. "[A] complaint must  
20 contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on  
21 its face.'" *Ashcroft v. Iqbal*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic*  
22 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads  
23 factual content that allows the court to draw the reasonable inference that the defendant is liable  
24 for the misconduct alleged." *Id.* "Determining whether a complaint states a plausible claim for  
25 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial  
26 experience and common sense." *Id.* at 1950. "While a complaint attacked by a Rule 12(b)(6)  
27 motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide  
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1 the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a  
2 formulaic recitation of a cause of action’s elements will not do. Factual allegations must be  
3 enough to raise a right to relief above the speculative level on the assumption that all the  
4 allegations in the complaint are true . . . .” *Twombly*, 550 U.S. at 555-56 (citations and emphasis  
5 omitted). “[O]nce a claim has been stated adequately, it may be supported by showing any set  
6 of facts consistent with the allegations in the complaint.” *Id.*

7           When assessing the sufficiency of the complaint, “[a]ll allegations of material  
8 fact in the complaint are taken as true and construed in the light most favorable to the  
9 nonmoving party.” *Vignolo v. Miller*, 120 F.3d 1075, 1077(9th Cir. 1997) (citing *Smith v.*  
10 *Jackson*, 84 F.3d 1213, 1217 (9<sup>th</sup> Cir. 1996)). The district court is not required to accept every  
11 conclusion asserted in the complaint as true rather the court “will examine whether conclusory  
12 allegations follow from the description of facts alleged by the plaintiff.” *Holden v. Hagopian*,  
13 978 F.2d 1115, 1121 (9<sup>th</sup> Cir. 1992) (quoting *Brian Clewer, Inc. v. Pan American World*  
14 *Airways, Inc.*, 674 F.Supp. 782, 785 (C.D. Cal. 1986)).

#### 15 **IV. Analysis**

##### 16 **A. Arizona’s Notice of Claim Statute**

17           Arizona Revised Statute § 12-821.01 requires a claimant to provide a notice  
18 of claim to a public entity before initiating an action for damages against it:

19           A. Persons who have claims against a public entity or a public  
20 employee shall file claims with the person or persons authorized to  
21 accept service for the public entity or public employee as set forth  
22 in the Arizona rules of civil procedure within one hundred eighty  
23 days after the cause of action accrues. The claim shall contain facts  
24 sufficient to permit the public entity or public employee to  
understand the basis upon which liability is claimed. The claim shall  
also contain a specific amount for which the claim can be settled and  
the facts supporting that amount. Any claim which is not filed within  
one hundred eighty days after the cause of action accrues is barred  
and no action may be maintained thereon.

25           B. For purposes of this section, a cause of action accrues when the  
26 damaged party realizes he or she has been damaged and knows or  
27 reasonably should know the cause, source, act, event,  
instrumentality or condition which caused or contributed to the  
28 damage.

1 A.R.S. § 12-821.01. These statutory requirements serve “to allow the public entity to investigate  
2 and assess liability, to permit the possibility of settlement prior to litigation, and to assist the  
3 public entity in financial planning and budgeting.” *Falcon ex rel. Sandoval v. Maricopa County*,  
4 213 Ariz. 525, 527, 144 P.3d 1254, 1256 (Ariz. 2006) (quoting *Martineau v. Maricopa County*,  
5 207 Ariz. 332, 86 P.3d 912, 915-16 (Ariz.Ct.App.2004)). The requirement of filing a notice of  
6 claim is mandatory. Claims that do not comply with the notice-of-claim statute are barred and  
7 no action may be maintained. A.R.S. § 12-821.01. In *Deer Valley Unified School District v.*  
8 *Houser*, 214 Ariz. 293, 152 P.3d 490 (Ariz. 2007), the Arizona Supreme Court made clear that  
9 it requires strict compliance with the statutory requirements of A.R.S. § 12-821.01. *Deer Valley*,  
10 214 Ariz. at 295, 152 P.3d at 492.

11 As discussed below, Plaintiff’s two notices of claim delivered to Defendant  
12 City of Peoria, dated September 22, 2008 and December 19, 2008, fail to comply with A.R.S.  
13 § 12-821.01 in several respects.<sup>2</sup> (docket # 18, Exhs. A, B)

#### 14 **A. Timeliness**

15 If a notice of claim is not properly filed within the statutory time limit, a  
16 plaintiff’s claim is barred by statute. *Falcon*, 213 Ariz. at 527, 144 P.3d at 1256. Defendant  
17 first argues that Plaintiff’s claims must be dismissed because he did not timely serve a notice  
18 of claim. Defendant contends Plaintiff’s claim accrued on October 7, 2005, the date of the  
19 “trial” during which three unidentified Peoria Police Officers allegedly offered the false  
20 testimony upon which Plaintiff’s claims are based. Plaintiff served two notices of claim on the  
21 City of Peoria - first on September 22, 2008 and again December 19, 2008. Both notices were  
22 filed more than 180 days after the October 7, 2005 trial. In his Reply, Plaintiff argues that he  
23 timely served the City of Peoria a notice of claim, because the time for filing was “equitably  
24 tolled until October 7, 2008.” (docket # 25 at 3) The Court need not resolve this issue because,  
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27 <sup>2</sup> A district court may consider materials attached to Rule 12(b)(6) pleadings if they are  
28 materials of which the court may take judicial notice. *Barron v. Reich*, 13 F.3d 1370, 1377 &  
n. 2 (9<sup>th</sup> Cir. 1994).

1 even if either of the notices was timely, both notices fail to meet the substantive statutory  
2 requirements of A.R.S. § 12-821.01.

### 3 **B. Facts Supporting Claims of Liability**

4 Arizona Revised Statute § 12-821.01(A) requires that “the claim shall contain  
5 facts sufficient to permit the public entity or public employee to understand the basis upon  
6 which liability is claimed.” *Id.* The purpose of this statutory requirement is to allow the public  
7 entity to investigate and assess the claim. *Falcon*, 213 Ariz. 525, 144 P.3d 1254, 1256. Both  
8 notices of claim filed by Plaintiff discuss events surrounding a trust established in 2001 of  
9 which Plaintiff’s mother was initially trustee. Plaintiff claims that certain individuals, who are  
10 not City of Peoria employees, drained the trust. He further argues that three unidentified City  
11 of Peoria Police Officers offered false testimony during a trial on October 7, 2005. Neither  
12 notice of claim includes facts describing Plaintiff’s claims nor identifies the individuals who  
13 allegedly caused harm to Plaintiff. Plaintiff refers to a “trial” that took place on October 7,  
14 2005, but does not state where or in what court that trial took place, or otherwise describe the  
15 nature of the proceeding, or the police officers’ allegedly false testimony. Plaintiff does not  
16 provide the name of any City of Peoria employees involved or describe the injury Plaintiff  
17 suffered. Without such rudimentary facts, the City of Peoria could not investigate and assess  
18 the claim. Accordingly, the notices of claim fail to provide facts sufficient to permit the City  
19 of Peoria to evaluate the claim to understand the basis of the City’s liability. Plaintiff’s action  
20 is barred on this basis.

### 21 **C. Specific Amount and Supporting Facts**

22 Plaintiff’s two notices of claim also fail to include a specific amount for which  
23 the claim could be settled, and lack sufficient facts to support the requested settlement amount.  
24 Arizona Revised Statute § 12-821.01(A) requires that “the claim shall also contain a specific  
25 amount for which the claim can be settled and the facts supporting that amount.” This language  
26 instructs claimants to include a particular and certain amount of money that, if agreed to by the  
27 governmental entity, will settle the claim. The attendant statutory obligation that claimants  
28 present “facts supporting that amount” requires that claimants explain the amounts identified

1 in the claim by providing the governmental entity with a factual foundation to permit the entity  
2 to evaluate the amount claimed. This latter requirement ensures that claimants will not demand  
3 unfounded amounts that constitute “quick unrealistic exaggerated demands.” *Hollingsworth v.*  
4 *City of Phoenix*, 164 Ariz. 462, 466, 793 P.2d 1129, 1133 (Ariz.Ct.App.1990). Together, these  
5 statutory requirements ensure that governmental entities will be able to meaningfully consider  
6 a claim. *Deer Valley*, 214 Ariz. 293, 152 P.3d 490, 494.

7           In *Deer Valley*, the Arizona Supreme Court held that the claimant’s notice of  
8 claim failed to state a “specific” amount for which the claim could be settled, and, therefore,  
9 did not comply with A.R.S. § 12-821.01(A)’s statutory requirement. In *Deer Valley*, the  
10 claimant provided the following information regarding her damages: loss of previous salary of  
11 \$68,000.00 per year and an additional \$7,000.00 per year for summer school; anticipated raise  
12 of \$6000.00 for the upcoming school year and similar pay increases thereafter; \$36,800.00 in  
13 salary for the current year, economic damages anticipated to be approximately \$35,000.00 per  
14 year or more over the next 18 years; compensatory damages of no less than \$300,000.00 for  
15 emotional distress; and general damages of no less than \$200,000.00 for damage to her  
16 employment reputation. *Deer Valley*, 214 Ariz. 293, 152 P.3d 490, 492. The letter did not  
17 include information to support the amounts and merely demanded payment of said amounts. *Id.*  
18 The Arizona Supreme Court noted that claimant’s “repeated use of qualifying language[,such  
19 as approximate, or more, and no less than,] makes it impossible to ascertain the precise amount  
20 for which the [Defendant School] District could have settled her claim.” *Id.* at 493. The Court’s  
21 finding only addressed whether the amount claimed was specific and did not make a finding as  
22 to whether the letter provided facts supporting the amount claimed. *Id.* at 494 n. 3.

23           In *Backus v. State*, 220 Ariz. 101, 203 P.3d 499, 504-505 (Ariz. 2009), the  
24 Arizona Supreme Court clarified the supporting-facts requirement of A.R.S. § 12-821.01(A)  
25 as it pertains to the specific amount claimed. The Court held that a “claimant complies with the  
26 supporting-facts requirement of § 12-821.01(A) by providing the factual foundation that the  
27 claimant regards as adequate to permit the public entity to evaluate the specific amount  
28 claimed.” *Id.* The Court further stated that “this standard does not require a claimant to provide

1 an exhaustive list of facts; as long as the claimant provides facts to support the amount claimed,  
2 he has complied with the supporting-facts requirement of the statute and courts should not  
3 scrutinize the claimant's description of facts to determine 'sufficiency' of the factual  
4 disclosure." *Id.* In *Backus*, claimant brought a wrongful death action based on her father's death  
5 while in the custody of the Arizona Department of Corrections. *Backus*, 220 Ariz. 101, 203  
6 P.3d 499, 501. Claimant asserted that her father was 58-years-old when he died, mortality tables  
7 indicated that such a person had a life expectancy of 23.6 years, and sought damages in the  
8 amount of \$21,500.00 per year for a period of 23.6 years, for a total of \$507,400.00. *Id.* The  
9 Arizona Supreme Court concluded that claimant satisfied the supporting-facts requirement. *Id.*  
10 at 505.

11               In the instant case, Plaintiff did not state a specific amount for which he would  
12 settle the claim. Rather, in his September 22, 2008 notice, he demanded an amount "*in excess*  
13 *of \$100,000,*" which he raised to \$1,000,000 in his December 19, 2008 notice of claim. (docket  
14 # 18, Exhs. A, B) (emphasis added). As the Arizona Court found in *Deer Valley*, Plaintiff's use  
15 of qualifying language does not satisfy the specific-amount requirement. *Deer Valley*, 214 Ariz.  
16 293, 152 P.3d 490. Moreover, Plaintiff has also not complied with the supporting-facts  
17 requirement of § 12-821.01(A) because he fails to provide the factual foundation to permit the  
18 public entity to reasonably evaluate the specific amount claimed. *Backus*, 220 Ariz. 101, 203  
19 P.3d at 504-505. In fact, Plaintiff provides no facts to support the amounts claimed. Although  
20 Plaintiff is not required "to provide an exhaustive list of facts[,]" he has not provided any "facts  
21 to support the amount claimed," and thus, he has not complied with the supporting-facts  
22 requirement of the statute. *Id.* at 505.


23               In summary, Plaintiff's claims against the City Peoria are barred for failure to  
24 comply with the notice-of-claim requirements articulated in A.R.S. § 12-821.01. *Nored v. City*  
25 *of Tempe*, 614 F.Supp.2d 991, 996 (D.Ariz. 2008) (citing *Falcon*, 213 Ariz. at 527, 144 P.3d  
26 at 1256).

27               In accordance with the foregoing,  
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**IT IS ORDERED** that the Motion to Dismiss filed by Defendant the City of Peoria, docket # 18, is **GRANTED** and that this action is dismissed in its entirety. The Clerk of Court shall enter judgment accordingly.

Dated this 11<sup>th</sup> day of September, 2009.

  
Lawrence O. Anderson  
United States Magistrate Judge